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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

WILLIAM PERNAR MITCHELL, a/k/a/ BILL MITCHELL, and HWA SIM "BOBBI" MITCHELL,
PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 18, 1978

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v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners William P. Mitchell and Hwa Sim "Bobbi" Mitchell pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered March 9, 1978, which affirmed the judgment of the United States District

Court for the Western District of Washington.

OPINION BELOW

The opinion of the Court of Appeals has not been officially reported (see Appendix, infra). The petition for rehearing and suggestion for rehearing in banc filed pro se were denied on July 12, 1978. The mandate, which issued July 20, was recalled upon motion of petitioner, and leave was granted on August 21, for an extension of time to file this Petition for Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

QUESTIONS PRESENTED

1. William and Bobbi Mitchell, husband and wife, were indicted with others for conspiring to violate the Mann Act. Does the marital privilege against adverse testimony by a spouse require a showing

of actual knowledge to connect a husband to a conspiracy before his wife's tape-recorded statements to FBI informants are admissable against him? 18 USC § 371.

2. Petitioner William Mitchell was tried jointly with his wife and two other defendants. The taped conversations of his wife constituted the primary evidence against him. Was Petitioner William Mitchell deprived of the effective assistance of counsel by his attorney's failure to move to sever his trial from that of the other three defendants? Sixth Amendment, United States Constitution.

3. Were Petitioners William and Bobbi Mitchell, charged with conspiracy, deprived of effective assistance of counsel by their attorney's failure to disclose the possible conflicts arising from his joint representation of husband and wife at trial and on appeal? Sixth

Amendment, United States Constitution.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

18 U.S.C. §2421 provides in part:

> "Whoever knowingly transports in interstate or foreign commerce, . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice . . . shall be guilty of an offense against the United States."

18 U.S.C. §2422 provides in part:

> "Whoever knowingly pursuades, induces, entices, or coerces any woman or girl to go from one place to another in inter-

> state or foreign commerce, . . . for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such womon or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce . . . shall be guilty of an offense against the United States."

18 U.S.C. §371 provides in part:

> "If two or more persons conspire . . . to commit any offense against the United States . . . in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or in prison not more than five years, or both."

Federal Rules of Criminal Procedure, (18 U.S.C.) Rule 14 provides in part:

> "If it appears that a defendant . . . is prejudiced by a joinder of offenses or of de-

> fendants . . ., the court may . . . grant a severance of defendants or provide whatever other relief justice requires . . . ."

STATEMENT OF THE CASE

Petitioners WILLIAM P. MITCHELL and BOBBI MITCHELL were indicted, along with Mitchell's brother, Charles, and Arnold Price, on October 19, 1976, for conspiring to violate the Mann Act, 18 U.S.C. §§2421 and 2422. Charles Mitchell and Arnold Price were indicted in 6 other counts for actual violations of the Act. Trial was held before The Honorable Walter T. McGovern, commencing on January 17, 1977. On January 21, 1977, the jury returned a verdict of guilty. Both Petitioners filed timely notices of appeal to the Ninth Circuit pursuant to Federal Rules of Criminal Procedure and were released on their personal recognizance (R. 7, 165).

The evidence against Petitioner WILLIAM P. MITCHELL consisted primarily of two taped conversations between BOBBI MITCHELL and two government informants which occurred on August 13, 1976, after the informants arrived in Anchorage, Alaska (Tr. 325-330, 337-439). Other taped conversations involving Charles Mitchell, Arnold Price, and the two informants, contained references to WILLIAM P. MITCHELL's ownership and operation of a massage parlor in Ancourage, Alaska. Independent evidence established that WILLIAM and BOBBI MITCHELL jointly owned the massage parlor and that WILLIAM MITCHELL signed the paychecks of the parlor's employees (Tr. 679, 689-791).

Prior to trial, Petitioner WILLIAM MITCHELL moved to exclude the taped conversations asserting the common law marital privilege against

adverse testimony by his spouse. (Tr. 14-19, 89-100). The trial judge expressed his initial opinion that the evidence was indeed a violation of this privilege (Tr. 93-97), but reserved ruling and admitted the taped conversations on the second day of trial (Tr. 213). Petitioner took exception to this ruling and renewed his objection at the conclusion of the evidence in his motion for acquittal (Tr. 801-802). Both the court and the government recognized that the wife's statements constituted the crucial evidence against the husband (Tr. 18).

The evidence against BOBBI MITCHELL consisted of her statements to the two informants and her admitted ownership and operation of the massage parlor (Tr. 414).

WILLIAM MITCHELL was not a party to any of the taped conversations.

He had no part in inducing or in helping to transport the informants to Anchorage, nor was he accused of any such act. Indeed, he was out of town when the women arrived in Anchorage (Tr. 412). The only overt act contained in the indictment, with which WILLIAM MITCHELL is impliedly charged, involved a telephone conversation three days after the women returned from Anchorage (R. 10). The caller identified himself as "Bill Ryan," a business associate of BOBBI's. The evidence at trial was inconclusive, however. The informant with whom "Bill Ryan" spoke stated that she thought the voice was that of Charles Mitchell (Tr. 497, 547, 563).

Throughout the trial, defense counsel structured their case on a modified entrapment theory. According to that theory, since both informants had worked as prostitutes and had contacted

the authorities after Arnold Price had suggested that he knew someone who might be able to arrange their passage to Alaska, the informants were not "persuaded, induced, enticed, or coerced," within the meaning of 18 U.S.C. §2422 (e.g., Tr. 62, 68, 878). Petitioners' counsel joined in this theory (Tr. 98). Of the four alleged co-conspirators, only Arnold Price took the stand in his own behalf. Though Petitioners' attorney made two references to calling WILLIAM MITCHELL (Tr. 69, 667), at the close of the Government's evidence, no defense was mounted (Tr. 799).

DECISION OF THE COURT OF APPEALS

On appeal, Petitioners raised these contentions: (1) the recorded conversations of BOBBI MITCHELL were admitted into evidence against her husband, WILLIAM MITCHELL, in contra-

vention of the marital privilege against the compelled testimony of the spouse; (2) the evidence was insufficient to connect Petitioners to the conspiracy, and, thus, all statements of alleged co-conspirators were inadmissible as to them; and (3) the trial court erred in instructing the jury concerning Alaskan prostitution laws.

The Court of Appeals, in an unreported opinion by District Judge Russell E. Smith (sitting by designation), rejected Petitioners' arguments (Op. 11-13).

The court found the tapes admissible against WILLIAM MITCHELL on the theory that BOBBI MITCHELL, in making the statements, acted as an agent for WILLIAM MITCHELL. The statements were found to be made in the course of employment and were thus admissible as vicarious admissions of a principal.

This rule was held to apply in both civil and criminal cases. The court cited no authority.

The court also concluded that there was sufficient independent evidence to connect WILLIAM MITCHELL to the conspiracy. This evidence consisted of MITCHELL's own statements that he was BOBBI MITCHELL's husband, that he had purchased the massage parlor and was in the massage parlor business, records of the joint bank account and checks signed by WILLIAM MITCHELL payable to four female employees of the massage parlor (Op. 14).

Following entry of the opinion on March 9, 1978, Petitioners requested, and were granted, three extensions of time in which to file, pro se, a petition for rehearing and suggestion for rehearing en banc. At this point, Petitioners first raised the question of the

effectiveness of the assistance provided by their joint counsel at trial and on appeal. The court rejected the petition on July 12, 1978.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S HOLDING DIVERGES FROM OTHER CIRCUITS REGARDING APPLICATION OF THE MARITAL PRIVILEGE TO STATEMENTS OF AN ALLEGED CO-CONSPIRATOR AND IS CONTRARY TO THE SUPREME COURT'S RULING.

The question presented involves the interplay of two bodies of law--those rules pertaining to the admissibility of the declarations of co-conspirators and the common law principles embodied in the marital privilege against compelled testimony by the spouse. The marital testimonial privilege was specifically held applicable to cases in federal courts in a Mann Act case strikingly similar to this one. Hawkins v. United States, 358 U.S. 74, 79 S. Ct. 139, 4 L.Ed.2d 125 (1958).

The Court of Appeals, at 249 F.2d 735, 737, ruled that defendant's wife, who had transported the prosecuting witness from Oklahoma to Arkansas, was competent to testify against him. On appeal to the Supreme Court, the case was reversed for contravention of the marital privilege. After noting the long-standing nature of the privilege, the court stated:

> "(t)he basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now." 358 U.S. at 77.

The marital privilege rests on a policy of encouraging loyalty between spouses and a recognition that such loyalty often exists, and should exist, even where one spouse has violated

the law. Because of the difficulty of ascertaining the dynamics of each relationship, the rule prevents judicial inquiry into each separate situation by barring testimony except in exceptional circumstances. See: Wyatt v. U.S., 362 U.S. 525, 80 S.Ct. 901, 4 L.Ed.2d 931 (1970). Petitioners contend that this policy is as strong today as it was when Hawkins was decided. The decision in this case flies in the face of Hawkins.

The Court of Appeals relied on decisions in several circuits holding that an exception exists to the marital privilege where the statements of one spouse are admissible under the co-conspirator exception to the hearsay rule. Petitioners do not concede that such an exception is desirable or consistent with the decision in Hawkins. Nevertheless, assuming arguendo that such an exception is consistent with Hawkins

where both spouses are "substantial participants in patently illegal activity," United States v. Kahn, 471 F.2d 191, 192 (7th Cir. 1972), that exception is inapplicable here. In the cases relied on, the spouse against whom the other spouse's statements were introduced was shown by evidence of specific conduct, to have had actual knowledge of the illegal acts. No such showing was made concerning WILLIAM MITCHELL's conduct. The only serious implication of his guilt came in his wife's remarks to F.B.I. informants. Where an interest as important as the marital privilege is at stake, something more than the "likelihood of an illicit association" should be required. U. S. v. Ragland, 375 F.2d 471, 477 (2d Cir. 1967).

In United States v. Kahn, 471 F.2d 191 (7th Cir. 1972), cert. denied, 411 U.S. 986, the court found the marital

communication privilege inapplicable where a wiretap had intercepted conversations concerning gambling between husband and wife. The conversation itself established that both husband and wife had actual knowledge of the criminal venture.

In United States v. Van Drunen, 501 F.2d 1393 (7th Cir. 1974), defendant was charged with transportation of illegal aliens. The illegal aliens were his wife (whom he married one month after indictment) and her two children. Husband and wife were indicted jointly in a second count of illegal transportation of aliens. Although the case limits the marital privilege in language the court admitted was dictum, 501 F.2d at 1397, the case is not controlling, since the spouses were not indicted as co-conspirators. C.f., United States v. Pugliese, 153 F.2d 497 (2d Cir. 1945).

In United States v. Doughty, 460 F.2d 1360 (7th Cir. 1972), the husband was charged with aiding and abetting his wife in wilfully and knowingly attempting to evade payment of federal estate taxes. The facts of the case make clear that both husband and wife were involved in the actual conceilment of nearly $22,000 taken from the home of a decedent.

> "There is ample evidence in defendants' admissions and the false return to prove that both Doughty and his wife intended to evade the tax due upon the unreported cash." 460 F.2d at 1362.

In United States v. Mackiewicz, 401 F.2d 219 (2d Cir. 1968), husband and wife owned and managed jointly a small grocery store and were charged with tax evasion by understating their receipts. Both defendants took care of the books, though the husband prepared

all the joint returns. The court held that the joint return and the admissions of the husband to IRS agents were admissible against the wife. The court relied on an agency relationship between the spouses where the husband always acted for both on tax matters. More importantly, the husband did not actually testify to the statements at trial. 401 F.2d at 225.

> "This is not a case where the prosecution called the husband to the stand. If he had testified under those circumstances, the common law rule would have been violated. Here, however, we are one step removed from the actual testimony. Therefore, there is no chance that we might be repulsed by a spouse actually testifying against his mate . . . for there is the convenient buffer of the third person actually making the remarks." 401 F.2d at 225.

Mackiewicz, is distinguishable from this case since the testimony here

is in fact that of the wife (tape recordings). It would circumvent the entire privilege if the out-of-court statements of a spouse could be recorded and substituted for actual testimony at trial. U. S. v. Williams, 447 F.2d 894 (5th Cir. 1971); Ivey v. United States, 344 F.2d 770 (5th Cir. 1965).

A further distinction, crucial here, is that in Mackiewicz, the independent information (i.e., accounting records) showed the wife had actual knowledge of the fraudulent accounting. In the case of the MITCHELLS, the independent evidence showed only that they jointly owned a massage parlor, a legal business. The business records did no more than establish an agency relationship to the extent of operating the legal establishment. *

In United States v. Pugliese, 153 F. 497 (2d Cir. 1945), independent witness testimony showed defendant husband's participation in the illegal sale of alcohol. The court admitted his wife's statements to revenue agents.

Insufficient independent evidence was adduced by the Government to support the introduction of BOBBI MITCHELL's statements against her husband. The business was lawfully licensed and no acts of prostitution were shown to be taking place on the premises. For this reason, petition for certiorari should be granted.

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* At trial, WILLIAM MITCHELL's attorney failed to put on any evidence to show his actual involvement in the operation of the massage parlor. In fact, though the establishment is jointly owned, only BOBBI MITCHELL is named on the operating license. WILLIAM MITCHELL spent little time there, mainly doing maintenance; he spent most of his time with his real estate holdings. He paid the bills because his wife, of Korean extraction, reads and writes English poorly.

II. THE SUPREME COURT SHOULD SET STANDARDS FOR MEASURING EFFECTIVE ASSISTANCE OF COUNSEL WHEN ONE ATTORNEY REPRESENTS MORE THAN ONE ALLEGED CO-CONSPIRATOR AT THE SAME TRIAL.

A. WILLIAM MITCHELL was deprived of effective assistance of counsel by his attorney's failure to move to sever his trial from that of his alleged co-conspirators.

The Sixth Amendment to the United States Constitution guarantees every defendant in a criminal case the effective assistance of counsel. The Supreme Court, however, has not enunciated any clear standard by which to guage counsel's performance in the course of his representation. Historically, counsel's efforts must have been so perfunctory as to render a trial a farce or mockery of justice. A majority of the circuit courts still adhere to this standard. Peek v. U.S., 321 F.2d 934

(9th Cir. 1963), cert. denied, 376 U.S. 954. The Ninth Circuit has recently changed to the "reasonably effective assistance" standard, discussed infra. United States v. Elksnis, 528 F.2d 236 (9th Cir. 1975).

> "Stringent as the 'mockery of justice' standard may seem, we have never intended it to be used as a shibboleth to avoid a searching evaluation of possible constitutional violations; nor has it been so used in this circuit. It was not intended that the 'mockery of justice' standard be taken literally, but rather that it be employed as an embodyment of the principle that a petitioner must shoulder a heavy burden in proving unfairness." McQueen v. Swenson, 498 F.2d 207, 214 (8th Cir. 1974).

In recent years, the standard has some under heavy criticism. Among others, both Chief Justice Warren Burger and D.C. Circuit Judge David Bazelon have criticized the qualifications of a

substantial portion of the bar to practice criminal law. See Gard, "Ineffective Assistance of Counsel--Standards and Remedies," 41 Missouri L. Rev. 483, 485 at n. 17-19 (1976). Attuned to these criticisms, several circuits have rejected entirely the mockery of justice standard. The Fifth Circuit stated in MacKenna v. Ellis, 280 F.2d 592 (1960):

> "We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." 280 F.2d at 599 (emphasis in original).

The Third Circuit adopted a similar standard in Moore v. United States, 432 F.2d 730 (1970):

> "(T)he standard of adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place." 432 F.2d at 736.

That court went on to state that an inquiry into the effectiveness of counsel's assistance requires consideration of what counsel fails to do as well as what he does. 432 F.2d at 739. Both the Fourth Circuit and the D.C. Circuit have prescribed minimum guidelines for effective assistance. Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968); United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973).

At least one commentator has argued that the standard should be even sterner:

> "The test of effective assistance of counsel should be whether counsel exhibited the normal and customary degree of skill possessed by attorneys who are fairly skilled in the criminal law and who have a fair amount of experience at the criminal bar. (Emphasis in original.) Finer, Ineffective Assistance of Counsel, 58 Cornell L. Rev. 1977, 1080 (1973)."

At least one state court seems to have adopted this standard. Risher v. State, 523 P.2d 421, 424-25 (Alaska, 1974).

Whatever the standard may be, it is clear that in order to establish ineffective assistance of counsel, a petitioner must point to some specific conduct which resulted in prejudice to him. The degree to which prejudice must be shown should depend on the facts of each case. Peek v. United States, supra, 321 F.2d 934. Petitioners' counsel made no motions before trial, other than an oral motion to suppress the taped conversations. Even in making this motion it appears that counsel was unprepared to argue it effectively (Tr. 14-18; 99). Counsel did not seek to change venue nor to interview witnesses. (Tr. 704.)

> "Effective assistance does not demand that every possible motion be filed, but only those having a solid foundation." U. S. v. Hines, 470 F.2d 225, 232 (3d Cir. 1972).

Petitioner WILLIAM MITCHELL contends that, given the vastly disproportionate weight of the evidence, counsel should have attempted to have his trial severed from that of the other alleged co-conspirators.

In United States v. Figueroa-Paz, 468 F.2d 1055 (9th Cir. 1972), the court stated:

> "The mere joint trial of husband and wife does not require severence where, as here, the government did not introduce the statements of one to incriminate the other." 468 F.2d 1057.

In this case, the Government clearly indicated before trial that it intended to introduce the tape recorded conversations of BOBBI MITCHELL (Tr. 89-99). Nevertheless, counsel made no attempt to sever the trials.

In United States v. Fields, 458 F.2d 1194 (3d Cir. 1972), cert. denied, 412 U.S. 927, one defendant attempted to call the other defendant's wife to testify about matters relevant to charges against both defendants. The husband moved for a severence. The court permitted the testimony and instructed counsel that examination should be limited to matters which did not incriminate the husband. Since the marital privilege applied, the Third Circuit held that failure to sever was plain error. 458 F. at 1199.

In United States v. Mardian, 546 F.2d 973 (D.C. Cir. 1976), the court decided that defendant Mardian was entitled to have his trial severed from that of the co-conspirators. The court noted the particular problems involved in conspiracy cases including "the

liberal rules of evidence and the wide latitude of accorded to the prosecution," Glasser v. United States, 315 U.S. 60, 76, 62 S. Ct. 457, 468, 86 L. Ed. 680 (1942), and the "dangers of transference of guilt" which require that a court should use "every safeguard to individualize each defendant in his relation to the mass." Kotteakos v. United States, 328 U.S. 750, 774, 773, 66 S. Ct. 1239, 1252, 90 L. Ed. 1557 (1946).

> "Particularly where there is a great disperaty in the weight of the evidence, strongly establishing the guilt of some defendants, the danger persists that the guilt will inproperly 'rub off' on the others. United States v. Kelly, 349 F.2d 720, 756-759 (2d Cir. 1965), cert. denied, 384 U.S. 947." 546 F.2d at 977.

In this case, as in Mardian, WILLIAM MITCHELL was charged in the conspiracy count. Mardian was named in

only five of 45 overt acts charged against the conspiracy. MITCHELL was directly charged with only one of twelve overt acts of conspiracy (ownership of the massage parlor--a questionable "act" at best), and implicated in making a telephone call to one of the informants after the conspiracy had been frustrated. As in Mardian, the evidence against the other alleged co-conspirators was overwhelming by comparison. The Government so much as conceded this before trial (Tr. 18). Much of the testimony and proof related to events in which WILLIAM MITCHELL took no active part. Clearly, there was a danger here that the overwhelming nature of the evidence against the other alleged co-conspirators would "rub off" on WILLIAM MITCHELL. Yet, counsel made no attempt to safeguard MITCHELL's rights at trial by moving to

sever.

Petitioner does not contend that this evidence required severence as a matter of law, but it does raise a substantial likelihood that prejudice resulted from the joinder. Yet, counsel made no attempt to prevent this prejudice. Petitioner asserts that this failure on the part of his counsel constitutes ineffective assistance.

B. Defense counsel's failure to explore the potential conflicts of multiple representation and to recommend separate attorneys constituted ineffective assistance.

Up until a week before trial, Petitioner's attorney represented not only WILLIAM and BOBBI MITCHELL, but CHARLES MITCHELL as well. At that time, the trial court brought potential conflicts of interest to the attention of

Petitioners' attorney and suggested that CHARLES MITCHELL at least retain separate counsel (Tr. 3-4). At no time, either before, during or after trial, did counsel discuss with Petitioners the potential ramifications of their joint defense. This conduct constituted ineffective assistance of counsel. See Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942), a conspiracy case:

> "To determine the precise degree of prejudice sustained by Glasser as a result of the clerk appointment of Stewart as counsel for Kreske [co-defendant] is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. (Citations omitted.)" 315 U.S. 75-76.

The question of whether prejudice is required to establish a Sixth

Amendment violation has not been dealt with consistently by the circuits. The Third, Seventh and Eighth Circuits require only that a conflict be shown to have existed. U. S. ex rel, Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973); United States v. Cougis, 374 F.2d 758 (7th Cir. 1967); Austin v. Erickson, 477 F.2d 620 (8th Cir. 1973). The D.C. Circuit in Lollar v. United States, 376 F.2d 243 (1967), while requiring that some prejudice be shown, arrived at that determination on the basis of "informed speculation," without regard to the actual quantum of prejudice involved. Such a rule accounts for the difficulty of a reviewing court determining with any precision those prejudicial elements which are not clear from the record. In this case, for example, it is not clear from the record why defense counsel did

not put WILLIAM MITCHELL on the stand to explain his role in the operation of the parlor or failed to put on a defense.

The other circuits seem to require an affirmative showing of prejudice. For example, in United States v. Christopher, 488 F.2d 849 (9th Cir. 1973), the court refused to find ineffective representation despite a failure to notify defendants that they had a right to separate counsel and to investigate possible conflicts in the representation because there was no showing of prejudice in the record.

In United States v. Mari, 526 F.2d 117 (2d Cir. 1975), the court found no prejudice resulting from joint representation where both defendants had pled guilty. In a concurring opinion, Judge Oakes set forth the law in that circuit:

> "It is true that the cases in our circuit have to date

> required a specific showing of prejudice or a real conflict of interest resulting from joint representation of co-defendants by one attorney before Sixth Amendment rights may be said to have been invaded. (Citations omitted.)
> . . .
>
> "The time is rapidly approaching, however, when, in the light of more exacting standards of the bar and the decisions of other leading courts, we may have to re-examine our rule." 526 F.2d at 119.

Judge Oakes points out that the District of Columbia has a rule of automatic appointment of separate counsel, at least initially.

The First Circuit requires that the trial court inquire into the defendant's discussion with counsel of the risks of joint representation and ascertain that the defendant has an understanding that he has a right to separate counsel, even at government

expense. "If the trial court neglects this inquiry, the government must prove that prejudice to the defendant was 'improbable.' United States v. Foster, 469 F.2d 1, 4-5 (1st Cir. 1972)." 526 F.2d at 120.

The court also refers to recent ABA standards:

> "The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation." ABA Standards: The Defense Function, §3.5(b) at 211, 213 (1971).

It is noteworthy that the Second Circuit, one year later, in U. S. v. Carrigan, 543 F.2d 1053 (1976), held that the law was clear that a trial

judge must inquire into the potential conflict as to joint representation. The burden of proof is shifted to the government if no inquiry takes place. See also ABA, Code of Professional Responsibility, D.R. 5-105 (A), (B) and (C).

The failure of counsel to inform them of the hazards of joint representation in a case such as this, constitutes inadequate representation in and of itself. In Baker v. Wainwright, 422 F.2d 145 (5th Cir. 1970), the court held that where a co-defendant confessed and implicated the defendant, representation of both was self-evident prejudice. There is no basis for distinquishing the holding in Baker, where the evidence against one spouse consists almost exclusively of potentially excludable out-of-court statements of the other

spouse. The remedy for a constitutional violation should not depend on speculation as to the possible motives of counsel in not mounting a defense, in failing to elicit testimony as to WILLIAM MITCHELL's actual participation in the management of the massage parlor, or in failing to move for severence of WILLIAM MITCHELL's case.

The joint representation was also prejudicial as to BOBBI MITCHELL and independent counsel may well have advised her to plea bargain. Representation of a defendant whose statements are used as evidence against another client-defendant involves a clear conflict of interest. See, United States v. Mahar, 550 F.2d 1005 (5th Cir. 1977); and Geer, "Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the

Defense Attorney," 62 Minn. L. Rev. 119, 125-27 (1978). Such a plea bargain may also have brought a lesser sentence. Where defendant is deprived of these options, she is prejudiced in the constitutional sense. See, Case v. North Carolina, 315 F.2d 743 (4th Cir. 1963).

CONCLUSION

For the reasons stated, this writ should be granted and the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

William P. Mitchell

Hwa Sim "Bobbi" Mitchell

Petitioners Pro se

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	Nos. 77-1929
ARNOLD J. PRICE, CHARLES R. MITCHELL, WILLIAM PERNAR MITCHELL, a/k/a BILL MITCHELL, and BOBBI MITCHELL,	)	77-1676 77-1609 77-1608 O P I N I O N
Defendants-Appellants.	)	

Appeal from the United States District Court for the Western District of Washington

Before: CARTER and HUFSTEDLER, Circuit Judges, and SMITH,* District Judge

SMITH, District Judge:

Defendants Arnold Price, Charles R. Mitchell, William P. Mitchell, and Bobbi Mitchell were convicted of a conspiracy to transport two women, Shelly

*The Honorable Russell E. Smith, Chief Judge of the United States District Court for the District of Montana, sitting by designation.

and Debbie,[1] in interstate commerce for purposes of prostitution, and Charles R. Mitchell was convicted of transporting Debbie from Washington to Oregon for purposes of prostitution.

Because of the confrontation problem arising as to Charles Mitchell, we set out the evidence supporting the conviction in more detail than ordinarily would be necessary. The detail is necessary to disclose, as to Charles Mitchell, the overwhelming nature of the evidence.

William P. Mitchell and his wife, Bobbi Mitchell, owned and operated Daisy Mae's Massage Parlor in Anchorage, Alaska. William Mitchell told a police officer of his ownership. It was stipulated that checks drawn on the account of Bobbi Mitchell and William Mitchell, signed by William Mitchell, were issued in payment of the earnings of female

employees of the massage parlor. Bobbi Mitchell, in a taped conversation with Shelly and Debbie, implicated William Mitchell in the operation of the business. In the same taped conversation she revealed that the parlor was operated for purposes of prostitution. The conversation was lengthy and explicit in sexual detail. William Mitchell and Charles Mitchell were brothers, and telephone records show that there was communication over the telephone listed to Daisy Mae's Massage Parlor and Bobbi Mitchell in Anchorage and the telephone listed to Charles Mitchell in Vancouver, Washington.

In June, 1976 Charles R. Mitchell told his friend Arnold Price of Daisy Mae's Massage Parlor and stated that anyone working there could make good money. He asked Price to let him know if he found anyone who would be

interested in working in the massage parlor. This is proven not only by the statements of co-conspirator Price, but by Price's testimony, given when he took the stand in his own behalf, and that testimony is corroborated by all of the subsequent happenings. Price, while employed by CETA, learned from Shelly, a fellow worker at CETA, that she had at one time been a prostitute. On July 26, 1976, while Shelly was visiting the CETA offices, Price advised her of the Alaskan massage parlor and told her that she could make $1,000 to $2,000 a month working there. Shelly said that she was interested and asked Price if he would arrange a meeting with his friend. Shelly advised her friend Debbie of the proposal, and then Debbie called Price and asked if she also could meet his friend. Price said "yes." These facts were proved by the testimony

of Shelly, Debbie, and Price. Price's testimony as to his conversation with Shelly was as follows:

> A. I don't remember exactly what was said but then I suggested to her that if she was interested in working in a sauna in Alaska, that she might want to check with a friend of mine.
>
> Q. And what was her response?
>
> A. She sort of raised her eyebrows and said, "That sounds interesting," and that was about all.
>
> Q. Now at that time did you say anything regarding the amount one could earn or whether prostitution was part of it?
>
> A. I believe I said she could make, maybe, $1,000 or $2,000 a month, or something like that. I don't remember exact figures.
>
> Q. Did you say anything about prostitution?
>
> A. I said, when I mentioned working in the sauna, she said, "Doing what?" and I said, "Whatever," or "Tricks," you know, "Turning tricks."
>
> Q. What did you mean when you said "turning tricks"?
>
> A. I meant prostitution.

Unbeknownst to Price, Shelly, who had been in marijuana trouble, was cooperating with the county drug enforcement officers. She advised the sheriff's office of Price's proposal. The sheriff's office in turn advised the FBI, and ultimately Shelly was asked to pursue the matter. Shelly called Price to arrange a meeting to discuss his offer. Price took Shelly and Debbie to Mitchell's house on August 5, 1976. The fact of this meeting at Charles Mitchell's house was proved by the testimony of Shelly, Debbie, and Price, and surveilling officer Smith. Smith took pictures of the women, Price, Price's car, and the Charles Mitchell house. That the meeting took place and that the conversation (not taped) related to Alaska is corroborated by a note shown to be in Charles Mitchell's handwriting and given

by him to Shelly. The note bears Charles Mitchell's name, address, phone number, and the word "Alaska." After the meeting, Shelly delivered the note to the officers, who initialed it and dated it August 5th, 1976.

On August 9th, in a taped telephone call to Price, Shelly made arrangements with Price to have him take her back to Charles Mitchell's house. A meeting at Charles Mitchell's house, attended by Debbie, Shelly, and Mitchell, occurred on August 11th. The conversation at that meeting, which revolved about the trip to Alaska, was taped.[2/] On August 12th, Debbie, in a taped telephone conversation with Charles Mitchell, discussed the trip to Alaska and arranged a meeting at Charles Mitchell's house on that evening.[3/] The meeting was held, and the entire conversa-

tion was taped.[4/] The trip to Alaska was discussed in detail, and arrangements were made for the women to meet at Charles' house the next morning. That same evening, and after the meeting, there was another taped telephone conversation[5/] between Debbie and Charles Mitchell in which the final arrangements for the transportation to Portland were made. Charles Mitchell took both women from Vancouver, Washington, to the Portland airport on August 13th. The fact of the trip is proved by Shelly and Debbie and corroborated by the testimony of a surveilling officer. Debbie testified that Charles Mitchell gave Shelly three hundreddollar bills. By airlines personnel, it was proved that two girls and a man approached the airlines counter, that one of the girls bought two tickets to Anchorage, Alaska,

with three hundred-dollar bills. At the request of an officer, the airlines personnel segregated the ticket coupon and the bills. They were admitted in evidence.

Shelly and Debbie boarded the aircraft and met an FBI agent in Seattle who made reservations for them in Anchorage. In Anchorage, on August 13th, they called Bobbi Mitchell, who came to their hotel room. The business of the massage parlor was thoroughly discussed, and the taped conversation shows unequivocally that Bobbi Mitchell expected Shelly and Debbie to report for work as prostitutes on the morning of the 14th. They did not report, but rather returned to Vancouver the next morning.

It is against this background that we discuss the assigned errors.

CROSS-EXAMINATION AND CONFRONTATION:

Charles Mitchell argues that the judgment should be reversed as to him because his cross-examination of Shelly was improperly limited and his constitutional right to confront her was thereby denied.

After Shelly's first conversation with Price, she called Vic Calzaretta, the chief criminal deputy in the sheriff's office. Later she met with Calzaretta and John Dush, an officer in the narcotics unit. The cross-examination of Shelly was limited as follows:

> Q. Had you ever worked in any capacity providing information such as that to Mr. Dush or to the individuals in the narcotics unit?
>
> MR. MOORE: Objection, Your Honor.
>
> THE COURT: Read the question.
>
> (Preceding question read by the reporter.)

THE COURT: What is the purpose?

MR. KANEV: Your Honor, for some reason, as the witness pointed out, she was met not by Mr. Calzaretta whom she telephoned, but by individuals of the narcotic unit.

THE COURT: So?

MR. KANEV: This line of questioning would go to her interest in the matter.

THE COURT: Sustained.

The defendant Charles Mitchell had the right to explore the relationship between the witness and the law enforcement officers (Davis v. Alaska, 415 U.S. 308 (1974); United States v. Callahan, 551 F.2d 733 (6th Cir. 1977); United States v. Garrett, 542 F.2d 23 (6th Cir. 1976); United States v. Croucher, 532 F.2d 1042 (5th Cir. 1976); United States v. Harris, 501 F.2d 1 (9th Cir. 1974); United States v. DeLeon, 498 F.2d 1327 (7th Cir. 1974)), and the cross-examination was limited improperly.

Charles Mitchell's cross-examination of Shelly was limited, but the fact is that Shelly's relationship with the police was explored fully. On cross-examination by counsel for William and Bobbi Mitchell, Shelly testified that she had been arrested for possession of marijuana on May 20, 1976; that following a hearing the charge was dropped; that she was friendly with John Dush, the narcotics officer, had worked for him, and had received expense reimbursement in the amount of $34.00. It also appeared that, at the time of the events in this case, she was under a subpoena to testify before a court but that she had never had to appear. Officer Dush testified that Shelly had been a confidential informant for the narcotics division of the sheriff's office for about three months prior to

events in this case and had worked on seven to nine heroin cases. Dush was fully cross-examined as to the relationship between Shelly and the narcotics division. We also note that Debbie, whose background was similar to Shelly's, was fully cross-examined as to her relationship with the officers.

The evidence against Charles Mitchell, consisting of documentary evidence, several taped conversations, and the testimony of many witnesses who corroborated each other on most of the facts in the case, was overwhelming. Considering this and the ultimate disclosure of Shelly's relationship to the police, we believe the limitation of her cross-examination was harmless error beyond any reasonable doubt.

The harmless error rule may apply even when the error stems from a

violation of the Constitution. For many years the harmless error rule has been stated by statute[6/] and by court rule.[7/] In 1967, in the case of Chapman v. California, 386 U.S. 18, the Supreme Court, after noting the statute and the court rule, consciously and deliberately examined the harmless error rule in its relationship to violations of constitutional rights and established the applicable law. The rule was stated as follows:

> [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

In 1968, in Bruton v. United States, 391 U.S. 123, the Supreme Court ruled that admission of extrajudicial confessions of co-defendants violated the right of cross-examination secured by the confrontation clause of the

sixth amendment, and then in 1969, in Harrington v. California, 395 U.S. 250, the Court reaffirmed Chapman and held that the harmless error rule was applicable in sixth amendment cases of the Bruton type. In affirming the conviction, the Court said at 254:

> We do not depart from Chapman; nor do we dilute it by inference. We reaffirm it. We do not suggest that, if evidence bearing on all the ingredients of the crime is tendered, the use of cumulative evidence, though tainted, is harmless error. Our decision is based on the evidence in this record. The case against Harrington was not woven from circumstantial evidence. It is so overwhelming that unless we say that no violation of Bruton can constitute harmless error, we must leave this state conviction undisturbed.

Now the problem arises -- is the harmless error rule announced in Chapman inapplicable where the sixth amendment comes into play by reason of

a limitation of cross-examination rather than by the reception in evidence of an extrajudicial confession of co-defendant?

In 1976, in Davis v. Alaska, 415 U.S. 308, 318, the Supreme Court said:

> On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petititoner was thus denied the right of effective cross-examination which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' Brookhart v. Janis, 384 U.S. 1, 3." Smith v. Illinois, 390 U.S. 129, 131 (1968).
>
> (Emphasis supplied.)

The precise question is whether the emphasized language was intended to make the rule of Chapman inapplicable

in all cases where there had been an erroneous limitation of cross-examination, or whether the Court was referring to the specific limitation in Davis v. Alaska, 415 U.S. 308 (1974), and holding that that limitation could not be harmless.

It is noted that the emphasized language in the quotation was taken from Brookhart v. Janis, 384 U.S. 1, 3 (1966). The issue in Brookhart was one of waiver. The emphasized language was not a holding by the Court in Brookhart that any limitation of the right of cross-examination was reversible error. It was nothing more than a quotation from an admission by the respondent in Brookhart that, absent a valid waiver, the error, i.e., a denial of all right of cross-examination, was one of great magnitude. Obviously, the

denial of all right of cross-examination cannot be harmless.

There was no need for the Court in Davis v. Alaska, 415 U.S. 308 (1974), to modify the rule of Chapman and establish a per se rule to achieve the result obtained. The case against the defendants in Davis depended almost entirely on the testimony of a juvenile delinquent named Green. He was, as the Court said, a "crucial witness," and it is evident from the opinion that without his testimony there could not have been a conviction. The cross-examination would have explored his relationship to the law officers and may have revealed some bias resulting from that relationship. In addition, it may have resulted in his impeachment. When the Court found that the right of "effective cross-examination" had been denied and

that this error was clearly prejudicial, the harmless error rule of Chapman could not be applied. We think the same may be said of the language used in United States v. Harris, 501 F.2d 1, 9 (9th Cir. 1974), and United States v. Alvarez-Lopez, 559 F.2d 1155, 1160 (9th Cir. 1977).

The result we reach could not be reached by holding that there was not here, as in Davis and Harris, a denial of "effective" cross-examination. The fact that Shelly's police relationships were explored by a co-defendant does not really relate to the effectiveness of the right afforded Charles Mitchell to cross-examine. Nor does the fact that the evidence against Charles Mitchell was overwhelming bear upon the effectiveness of the right to cross-examine afforded to Charles

Mitchell. These facts do, however, bear upon whether any damage was done to him and may be considered if the harmless error rule is applied.

In most cases where there is a denial of effective cross-examination, it would be impossible to find the denial harmless, but in this case we think it is, and in the absence of any case expressly renouncing the harmless error rule or any case mentioning it where a renunciation of it was necessary to the result,[8/] we reach our result on the basis of Chapman. We agree with the reasoning of the Fifth Circuit in United States v. Mayer, 556 F.2d 245, 252 n. 10 (1977).

MARITAL PRIVILEGE:

The taped conversations of Bobbi Mitchell were received in evidence

over the objection of her husband, William Mitchell, that his marital privilege[9/] was being violated. The taped conversations of Bobbi Mitchell were extremely damaging, and if the privilege applies, the judgment must be reversed.

In the federal courts, the husband has a privilege to prevent his wife from testifying against him. Hawkin v. United States, 358 U.S. 74 (1958); Bisno v. United States, 299 F.2d 711 (9th Cir. 1961).

In the Ninth Circuit, as distinguished from others,[10/] extra-judicial statements made by the wife are considered within the rule.[11/] Notwithstanding, it is our view that the Bobbie Mitchell tapes were admissible against William Mitchell. Statements made by an agent in the course of his

employment are the vicarious admissions of the principal. A conspirator is an agent in a criminal venture, and his admissions are likewise received against his co-conspirators. Where one spouse is shown to be an agent of the other, the vicarious admissions rule has been applied in both civil and criminal cases. 8 Wigmore on Evidence, McNaughton Revision § 2232, n. 3. The rule was specifically applied to a husband and wife venture in United States v. Pugliese, 153 F.2d 497 (2d Cir. 1945).[12/]

Even if we conceive of the privilege as one based on the "persistent instincts of several centuries"[13/] rather than a "sentimental relic,"[14/] we doubt that much instinctive support could be found for the proposition that a man may engage in a civil or criminal venture with his spouse, and then,

after she had said things which had to be said in the operation of the venture,[15] avoid responsibility for them on the basis of privilege which was initially rooted in the "legal fiction that a husband and wife were one person."[16] The language of the Supreme Court in Hawkins clearly indicates that the privilege was respected because of the belief that it does foster "family peace." In this sort of a case, where the wife is not the witness and the wife's words which are introduced are those which the husband authorized her to speak, it is difficult to see how the reception of the evidence could impair the relationship between the husband and the wife. We conclude that the rule should be that, where a husband and wife are engaged in a criminal conspiracy, the extrajudicial statements

of either made in furtherance of the conspiracy may be admitted against the other.

SUFFICIENCY OF EVIDENCE -- WILLIAM MITCHELL:

William Mitchell urges that the statements of Charles Mitchell, Arnold Price, and Bobbi Mitchell should not have been admitted against him because there was not sufficient independent evidence to connect him with the conspiracy. As previously indicated, it was proved that William Mitchell had said that he was Bobbi Mitchell's husband, that he had purchased Daisy Mae's Massage Parlor and was in the massage parlor business. Bank records showing the account of William and Bobbi Mitchell were admitted as exhibits, as were checks signed by William Mitchell payable to four of the female employess of

Daisy Mae's Massage Parlor. This was sufficient to connect William Mitchell to the conspiracy. See United States v. Perry, 550 F.2d 524, 528 (9th Cir. 1977); United States v. Turner, 528 F.2d 143, 161-62 (9th Cir.), cert. denied, 96 S.Ct. 426 (1975).

SUFFICIENCY OF EVIDENCE -- PRICE:

Price urges that the evidence was insufficient to prove Count 1 because there is no evidence that he intention-ally entered into an agreement to cause women to be transported for purposes of prostitution. On the record here, the contention borders on the frivolous. The common purpose was to recruit girls for purposes of prostitution. He furthered that purpose. A common purpose and plan could be inferred from the circumstances.[17/]

VOIR DIRE OF JURY:

Charles Mitchell requested the court on voir dire to instruct the jury on the presumption of innocence and burden of proof and to ask them whether they thought of such laws as being unfair. The trial court refused, and this refusal is assigned as error. The trial court did ask the jurors if they would follow his instructions as to the law. The jurors nodded in affirmation. At the close of the evidence, the jury was fully instructed as to the burden of proof, the presumption of innocence, and the defendants' right to remain silent. The jurors were sworn to follow the law. The scope of the voir dire is directed to the sound discretion of the trial court,[18/] and it is assumed that a jury will, in accordance with the oath they take, follow the judge's instructions.

Vitello v. United States, 425 F.2d 416 (9th Cir. 1970). On the specific questions here raised, the Sixth Circuit, in a divided opinion, held it error to refuse a request to voir dire the jury as to the presumption of innocence and the burden of proof. United States v. Blount, 479 F.2d 650 (6th Cir. 1973). The decision in Blount, a minority view, was specifically rejected by the Third Circuit in United States v. Wooton, 518 F.2d 943 (3d Cir.), cert. denied, 423 U.S. 895 (1974).[19/] We adopt the rule stated in Wooton as the rule in this circuit.

PROSECUTORIAL UNFAIRNESS CONSTITUTING A DENIAL OF DUE PROCESS:

Defendants Price and Mitchell were charged in Count 1 of the indictment with conspiracy and in Counts 2 and 3

with inducing Shelly and Debbie respectively to be transported in interstate commerce for the purposes of prostitution. At the close of the Government's case, and at the close of the evidence, Price and Mitchell moved for a directed verdict as to all counts. The motion was denied, and the court did instruct on Counts 2 and 3. The United States Attorney did not request the jury to convict on Counts 2 and 3, but did make perfunctory argument in support of Count 2 and 3. At the conclusion of all the arguments, the United States moved to dismiss those counts. The motion was granted, and only Counts 1 and 4[20/] were submitted. Price and Mitchell now urge that the United States deliberately confused and distracted the defendants by mentioning Counts 2 and 3 in the argument, but not asking for a convic-

tion as to them; that the Government, for all practical purposes, sought a compromise verdict; that the Government improperly supported its own integrity by being candid as to Counts 2 and 3, and made its conspiracy case stronger by arguing Counts 2 and 3. On a review of the record, we do not find the unfairness of which Price complains. As indicated, Counts 2 and 3 charged that defendants persuaded, induced, and enticed Shelly and Debbie to travel in interstate commerce for purposes of prostitution. The weakness, if any, in Counts 2 and 3 was not in a failure to prove defendants' conduct. That was proved beyond any reasonable doubt, but the women testified that they had no intention of prostituting themselves in Alaska and that they were not persuaded by defendants to go there, but rather

went because the law enforcement officers asked them to. Without passing on the question of whether the evidence was sufficient to warrant a conviction on Counts 2 and 3, we note that had Counts 2 and 3 been erroneously submitted to the jury that error would not, under the circumstances here, have warranted a reversal as to Count 1. All facts tending to support Counts 2 and 3 were admissible to prove Count 1.[21/] Had Counts 2 and 3 been submitted, defendants would have been required to argue them, and the jury would have had the opportunity to compromise, which they did not have when Counts 2 and 3 were dismissed. It may be that the United States Attorneys did improve their image of integrity by their candor in indicating the difficulties with Counts 2 and 3 and ultimately moving to dismiss them, but

we are of the opinion that the United States Attorney owes a duty of candor, and the prosecution cannot be faulted here for fulfilling that duty. In short, there simply was not unfairness of the type condemned in Berger v. United States, 295 U.S. 78 (1935).

DUE PROCESS:

Defendants Price and Mitchell assert error in the court's refusal to instruct the jury on the "due process" defense.[22/] This contention also borders on the frivolous. They are not in a position to assert entrapment, or the so-called "due process" defense, because the crime of conspiracy was complete when the first overt act in furtherance of it was committed. An overt act was committed when Price first discussed the Alaskan venture with Shelly, and at that

time no police officer of any kind even knew of the conspiracy.

We have examined other assigned errors and find them to be without merit.

The judgments are affirmed.

F O O T N O T E S

1/ The first names of these witnesses are used to preserve, to the extent possible, their anonymity.

2/ The following are excerpts from the tape of the conversation at Mitchell's home on August 11th:

Deborah: I thought we might like to go.
Arnie : You would. When would you like to go?
Deborah: Friday, maybe.
Charles: The end of the week? O.K. Maybe I'll call tonight and make arrangements.
Shelly : Arnie, is there going to be somebody up there to meet us?
Charles: Yea, you see, the whole thing to me is exciting. I mean it. The idea of a

vicarious thrill I was in on, somebody flying away in something they don't know. You know, all they got is a free ticket and promise of big money. (Tr. 131-32.)

and

Deborah: What if it's -- O.K., if it's this type of job, how come they guarantee us a thousand to fifteen hundred dollars?

Charles: Well, that's what the girls are making. They're making a thousand to fifteen hundred dollars.

Arnie : That's what they ask for. You just go up to your room.

Charles: I don't know how they work it, to tell you the truth. I don't know the details. I mean if I was a female, I would know every detail.

Shelly : Well, how much does a trick go for up there?

Charles: I don't know, but see --

Arnie : You see, you have to get with somebody to find out what they are getting.

Deborah: That's it.

Charles: Right. Well, it's --

Deborah: But you can't do that when you're working out of a parlor or something, Arnie.

Arnie : Oh.

Charles: Yea, there's a set --

Deborah: They have a set price.

Charles: Yea, I imagine it's a hundred. (Tr. 140-41.)

and

Deborah: I was going to say, if there's that much women going up there, how is he going to know which two to pick up?

Charles: Yeah, well, I don't even know.

Arnie : There's a lot of them going up there.

Charles: Why don't you tell him. I'll just tell him I'll work something out. I don't know, I'll call him and tell him you're coming, or something. I'll just tell him. I don't know, I'll call him and tell him you're coming Friday or Saturday.

Deborah: Then do you want us to pick our tickets up at the airport, or --

Charles: Well, we have to do that this, this way. This might sound suspicious, but we do it this way because there is a legal hassle. What I will do, I will buy you the tickets I'll go to the airport with you, buy you the tickets, or give you the money and you go buy the tickets. Then I don't know how that works one way or the other.

Debbie : Legal hassle?
Arnie : More like you give them the money to buy their own tickets?
Charles: Right.
Shelly : O.K.
Deborah: Oh, so, if --
Arnie : So, if it ever comes down to it --
Deborah: You didn't transport us. You just bought a ticket to Alaska at the airport.
Charles: Fine, that's what it amounts to. (Tr. 145-46.)

and

Charles: Now, I call this guy and I say, "I'm sending a couple of girls up," you know. "Do you need a couple more girls"? and he says, "Yea," he's going to immediately think that, you know, he's not going to give you the benefit of the doubt. He's going to say, "Well, there's a couple more prostitutes coming up here."
Shelly : Uh, huh.
Charles: When he's dealing with these people who are, you know, he's been dealing with these people.
Deborah: Well, mention to him that we work together now, we're team work. You know, so that's a new thing for his place, too. (Tr. 162-63.)

3/ The following is an excerpt from the tape of the first telephone conversation of August 12th:

Debbie: Did you talk to them, right?
Charles: Yes, it's sort of up in the air. Can you go, could you leave tomorrow?
Debbie : Yes.
Charles: O.K.
Debbie : I'd like to leave early.
Charles: O.K., well, here's how we have to do it. We have to do it this way. There's a flight leaving at 2:25 and there's one leaving at 5:25. Now I know it sounds strange but this is the way that I was instructed to do it. This is the way we're gonna do it. One of you can go at 2:25 and the other one of you can go at 5:25. O.K.?
Debbie : All right.
Charles: It sounds strange, doesn't it?
Debbie : Yes.
Charles: O.K. Well, if you're afraid of that, I don't blame you, but that's the way it's going to happen.
Debbie : Hum.
Charles: You see.
Debbie : Well, --
Charles: I know it sounds flaky, and I'll explain to you exactly why it's done this way, you see. I can explain it to you.
Debbie : O.K. Go ahead.

Charles: Well, I really don't want to go into detail over the phone.
Debbie : Yes, true.
Charles: O.K.
Debbie : Could we come over maybe talk to you?
Charles: I'm leaving, I have to go show a house at 7:00 o'clock. You want to come by about 8:00?
Debbie : About 8:00 o'clock.
Charles: O.K., you come by about 8:00. O.K.? (Tr. 462-63.)

4/ The following are excerpts from the tape of the conversation at Mitchell's home on August 12th:

Charles: . . . how old are you?
Debbie : Twenty-two.
Charles: And you're? Twenty years old? You guys are just babies.
Shelly : Twenty.
Charles: I mean you're just, you know, you look older than you are, really no offense.
Debbie : Well, I've been out on my own since I was fifteen.
Charles: Well, then. You know, I'm just trying to avoid, you know, the fucking feds coming and saying we got a warrant here for your arrest, you know, blah, blah, blah, got to call the bondsman, you know. Go through a bunch of bullshit. (Tr. 470.)

and

Debbie : . . . O.K., now, Charles, be up. I'll call you at -- I'll call you at 5:30 and wake you up, all right? O.K.? Put the phone by your bed or wherever you sleep. O.K., and that will be on Alaska Airlines 87, and we'll arrive there at 5:35. So, don't mention it here, like I said.
Charles: O.K., well, if that's the way you want to do it.
Debbie : I just would, you know, when we first meet them, I'd like to be cleaned up and presentable, you know. I don't want to walk in like a slob and have them say, "Wow, send those girls back." You know, we got to make it look good for you, too, Charles. We don't want you sending no creeps up there.
Charles: I don't do that. Yes, you know, "I'm sending a girl up," and she gets off the plane -- (laughter)
Debbie : I'm glad we got this straightened out. So, 5:30 in the morning to wake you up, 'cause we have to be on our way, you know, to make that 7:20.
Charles: O.K. . . . (Tr. 489-90.)

5/ The following are excerpts from the tape of the second telephone conversation between Debbie and Mitchell on August 12th:

Charles: Hello.
Debbie : Charles?
Charles: Yes.
Debbie : This is Debbie.
Charles: Hi.
Debbie : Hi, we made it easier on you.
Charles: How?
Debbie : We called and I decided that, we can just take that 9:45 one? It'll be the same thing, but we won't have to spend so much time in Seattle that way.
Charles: O.K., then what time? Yeah, that'll work.
Debbie : O.K. (Tr. 494.)

and

Charles: O.K. So what time should I look for you tomorrow?
Debbie : Let's see, if it leaves at 9:45, we'll be there probably --
Charles: 8:30.
Debbie : Does that sound good? About 8:30?
Charles: Fine, that's work.
Debbie : Alrighty.
Charles: O.K., I'll talk to you then.
Debbie : Alrighty. (Tr. 495.)

6/ "On the hearing of any appeal or writ of certiorari in any case, the court will give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (1959).

7/ "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 52(a).

8/ United States v. Brady, 561 P.2d 1319 (9th Cir. 1977), wherein it is said at 1820:

> As the Government acknowledges, the restriction of a defendant's right to cross-examine a government witness can be a denial of the defendant's constitutional right of confrontation. (Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed.2d 347 (1974); Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624 (1931); United States v. Alvarez-Lopez, 559 F.2d 1155 (9th Cir. 1977).) We need not decide whether the error in this case was of constitutional dimension, however, because we are convinced that the error was prejudicial even if the confrontation threshold were not crossed.

and United States v. Ortega, 561 F.2d 803 (9th Cir. 1977), wherein it is said at 806:

> Error in the restriction of a defendant's cross-examination of a government witness has constitutional implications and, therefore, we must be extremely hesitant in brushing aside such error as harmless. (Citing cases.)
>
> We need not decide whether error in this case was of constitutional magnitude requiring reversal, how-

ever, because we are convinced that the combined errors in permitting Gilbert to be impeached by his shoplifting conviction and in refusing to permit impeachment of a government witness by proof of a prior felony conviction were prejudicial.

9/ "In the federal jurisdiction the 'incompetency' is stated in terms of privilege, and the privilege is limited to that of a spouse charged in a criminal action to prevent his spouse from testifying against him." 3 Jones on Evidence 700 (6th ed. 1972).

10/ United States v. Mackiewicz, 401 F.2d 219, 225-26 (2d Cir.) cert. denied, 393 U.S. 923 (1968).

11/ Peek v. United States, 321 F.2d 934, 943 (9th Cir. 1963), cert. denied., 376 U.S. 954 (1964); Olender v. United States, 210 F.2d 795, 800 (9th Cir. 1954), cert. denied, 352 U.S. 982 (1957).

12/ Judge Learned Hand, speaking for the court, said at 500:

> The last point is the judge's refusal to direct the jury not to use against Pugliese the declarations of his wife to the policeman. The fact that the couple was not indicted for conspiracy, was irrelevant in determining the competency against him of any thing she might say. American Fur Company v. United States, 2 Pet. 358, 365, 7 L. Ed. 450; Tuckerman v. United States, 6 Cir., 291 F. 958, 970; Gooch v. United States, 10 Cir., 82 F.2d

> 534, 536, 537. That depended upon whether what she said was a step in a venture to which both were parties. If it was, it was admissible in any prosecution or in any civil action; if it was not, it was as incompetent in a prosecution for conspiracy as anywhere else, although it appears impossible to disabuse prosecutors of the contrary belief. As we said in Van Riper v. United States, 13 F.2d 961, 967: "When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made 'a partnership in crime.' What one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all." See also United States v. Goodman, 2 Cir., 129 F.2d 1009, 1013.

Cf. United States v. Van Drunen, 501 F.2d 1393 (7th Cir.), cert. denied, 419 U.S. 1091 (1974); United States v. Mackiewitz, 401 F.2d 219 (2d Cir.), cert. denied, 393 U.S. 923 (1968); United States v. Doughty, 460 F.2d 1360 (7th Cir. 1972); United States v. Kahn, 471 F.2d 191 (7th Cir. 1972) (involving the confidential communication privilege).

13/ Hawkins v. United States, 358 U.S. 74, 79 (1958).

14/ Hawkins v. United States, 358 U.S. 74, 81 (1958).

15/ A substantial part of the conversation between Bobbi Mitchell and Shelly and Debbie was a necessary indoctrination.

16/ Hawkins v. United States, 358 U.S. 74, 75 (1958).

17/ Glasser v. United States, 315 U.S. 60, 80 (1942). See also United States v. Perry, 550 F.2d 524 (9th Cir. 1977).

18/ United States v. Silla, 555 F.2d 703 (9th Cir. 1977); United States v. Heck, 499 F.2d 778 (9th Cir. 1974).

19/ Accord, United States v. Ledee, 549 F.2d 990 (5th Cir. 1977); United States v. Cosby, 529 F.2d 143, 147-49 (8th Cir.), cert. denied, 426 U.S. 935 (1976); United States v. Crawford, 444 F.2d 1404 (10th Cir.), cert. denied, 404 U.S. 855 (1971); United States v. Gillette, 383 F.2d 843 (2d Cir. 1967).

20/ Count 4 charged only Mitchell.

21/ Had there been a conviction on Counts 2 and 3 and sentences imposed no greater than and running concurrently with those given in Count 1, the Court of Appeals, under the concurrent sentence rule, would not have been required to review the judgment. Barnes v. United States, 412 U.S. 837 (1973); Benton v. Maryland, 395 U.S. 784 (1969); Hirabayashi v. United States, 320 U.S. 81 (1943); United States v. Fishbein, 446 F.2d 1201 (9th Cir. 1971); United States v. Washabaugh, 442 F.2d 1127 (9th Cir. 1971); Lambert, Inc. v. Starbrand Sales Corp., 422 F.2d 621 (7th Cir. 1970).

22/ Mitchell's requested instruction was as follows:

> It is a defense to a crime that the Government engaged in overreaching participation in the commission of the crimes charged in counts II, III and VI.
>
> As you will recall, the evidence regarding the Government's participation in this case, focused to a great extent on the activities of Shelly and Debbie (surnames omitted) who testified in this case. In consideration of this defense, you, as the sole judges of the facts, must determine what role these women played in the case based upon a careful and thorough review of all the evidence. You must determine whether the facts as you find them, amount to an intolerable degree of overreaching governmental participation.
>
> If you find that the overreaching participation by the government agents or informers in the activities as you have heard them testified to here were so fundamentally unfair to be offensive to the basic standards of decency, and shocking to the universal sense of justice, then you may acquit each defendant to whom this defense applies. -- Record on Appeal 129.

Price's requested instruction was similar.

JAMES M. CARTER, Circuit Judge, concurring:

I concur in the result reached by the majority in this case and in most of the reasoning in support thereof. My only disagreement concerns the treatment of Charles Mitchell's claim that his constitutional right to cross-examine was abridged. I understand the majority to hold that restricted cross-examination claims are tested by the following procedure: (1) the reviewing court determines whether the constitutional right to effective cross-examination has been abridged. If so, then (2) the court reviews the entire record to determine whether the error in restricting the cross-examination was harmless beyond a reasonable doubt. I also understand the majority to explain recent cases such as Davis v. Alaska, 415 U.S. 308 (1974); United States v.

Harris, 501 F.2d 1 (9 Cir. 1974); and United States v. Alvarez-Lopez, 559 F.2d 1155 (9 Cir. 1977), which contain language hinting at a per se rule, to be cases which in fact did apply the test described above.

My difference of opinion concerns the proper application of the test to the facts of this case. The majority concludes it was error to limit Mitchell's cross-examination but that the error was harmless beyond a reasonable doubt. I would hold, as shown below, that although initially it may have been wrong to limit Mitchell's cross-examination, this mistake was corrected before trial ended, resulting in no error on appeal and no occasion to resort to the harmless error standard. In any event, I am in complete agreement that there is no rule that erroneous limitation of cross-

examination constitutes per se a violation of a defendant's constitutional right to confrontation. If error does exist, it is tested, as the majority states, by the harmless error standard.

Limitation of cross-examination cannot be shown to be error if the material sought to be introduced by cross-examination is otherwise adequately presented to the trier of fact during the trial. Recently this same issue arose in Skinner v. Cardwell, 564 F.2d 1381 (9 Cir. 1978), when a defendant was denied the opportunity to have his attorney cross-examine a prosecution witness about information which was relevant and material to potential impeachment of another prosecution witness. In Skinner we upheld the district judge and held:

> "The test, for whether cross-examination about a relevant topic

> was effective, i.e., whether the trial court has abused its discretion, is whether the jury is otherwise in possession of sufficient information upon which to make a discriminating appraisal of the subject matter at issue." (Emphasis supplied.) Skinner v. Cardwell, supra, at 2973.

Under this test effective cross-examination was not denied to Charles Mitchell. Judge Smith's opinion explains in detail how the material about which Charles Mitchell sought to cross-examine--Shelly's relationship with the police--was fully explored before the jury.

The fact that this information was brought in by co-defendants' counsel subsequent to Mitchell's attempt to introduce it is not determinative.

Neither the order of proof at trial nor the identity of the party presenting it is so critical that a mistake of potential constitutional magnitude cannot be corrected if the trial judge notes it and takes corrective action. Of course, in each case we must be sure that the corrective action taken satisfies the standards of the Constitution, but the central problem is not the technical concern of who brought the information before the court or how it was presented. It is whether the relevant subject matter was fully explored before the factfinder.

Substantively there is not a great deal of difference in the position taken by Judge Smith and the one I would take. Not mentioned in Judge Smith's opinion, but I think inherently encompassed in his holding concerning the

harmless error, is the concept that if the disputed material is permitted to go before the jury in one way or another either before or after denial of cross-examination to a defendant who seeks to produce that material, the defendant should not be permitted to complain about it. A holding to the effect that there was per se error and that it was immaterial that the evidence got into the record at some other time would wreak havoc in the trial of multi-defendants in major criminal cases.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit on the counsel for Respondent by enclosing a copy thereof in an envelope, postage prepaid, addressed to:

James R. Moore
United States Attorney
1021 U. S. Courthouse
Seattle, Washington 98104

and depositing the same in the United States mails at Portland, Oregon, on September 18, 1978, and further certify that all parties required to be served have been served.

William P. Mitchell

Petitioner Pro Se

Supreme Court, U. S.
FILED
DEC 4 1978
MICHAEL RODAK, JR., CLERK

No. 78-489

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM PERNAR MITCHELL AND
HWA SIM MITCHELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 40-89) is reported at 577 F.2d 1356.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1978. A petition for rehearing was denied on July 12, 1978. The petition for a writ of

certiorari was filed on September 20, 1978, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the marital privilege bars the introduction of a wife's out-of-court statements made during the course and in furtherance of a conspiracy with her husband and others.

2. Whether petitioners were denied the effective assistance of counsel at trial.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioners, husband and wife, were convicted with others of conspiring to transport two adult women in interstate commerce for purposes of prostitution, in violation of 18 U.S.C. 371 and 2421.[1] Petitioners were sentenced to two years' imprisonment, with all but six months of that term suspended in favor of probation (R. 172, 173). The court of appeals affirmed (Pet. App. 40-89).

The evidence adduced at trial showed that in July 1976 co-defendant Arnold Price asked Shelly Lehman

[1] Arnold Price and Charles Mitchell were tried jointly with petitioners. Price was convicted on the conspiracy count; Charles Mitchell was convicted on both the conspiracy count and one substantive count of transporting a woman in interstate commerce for purposes of prostitution.

if she would be interested in working as a prostitute in Alaska (Tr. 72-75, 751-752). Lehman, who was a police informant at the time, feigned interest in the proposal and immediately alerted local law enforcement authorities (Tr. 77-78, 276-277). Deborah Elms, a friend of Lehman and also a police informant, told Price she too would be interested in working as a prostitute in Alaska (Tr. 76, 505, 727). Price arranged a meeting in August 1976 between the two women and co-defendant Charles Mitchell, the brother of petitioner William Mitchell (Tr. 78-81). At that meeting, Mitchell and Price explained that the prostitution operation in Alaska was run by "Bill and his Korean wife," and indicated that transportation to Alaska would be arranged for them (Tr. 84-86, 104-105).

At ensuing meetings and in a number of telephone calls between the informants and co-defendant Charles Mitchell, travel arrangements and other details were settled. These conversations were recorded by FBI agents with the women's consent, and the recordings were played at trial (Tr. 106-117, 125-166a, 458-495). On August 13, 1976, Charles Mitchell transported both Lehman and Elms from Vancouver, Washington, to the airport at Portland, Oregon. Accompanied by Mitchell and with funds provided by him, the women purchased tickets and boarded a flight for Anchorage, Alaska (Tr. 174-181).

Upon their arrival in Anchorage, Elms called a telephone number provided by Charles Mitchell and

spoke with petitioner Hwa Sim ("Bobbi") Mitchell, petitioner William Mitchell's wife, who agreed to visit the women in their hotel room (Tr. 180-182, 448-449). Bobbi Mitchell came to the hotel and gave a detailed account of the prostitution operation that she and her husband ran at a massage parlor. She instructed the two women to report for work there the following day (Tr. 338-436). With the informants' consent, that conversation was recorded by the FBI and admitted into evidence (Tr. 331, 337). The two women did not report for work the next day, but instead returned to Vancouver, pursuant to FBI instructions (Tr. 186).

The evidence further showed that William Mitchell had purchased the massage parlor in Anchorage for $17,000 (Tr. 676-683). Bank records reflected that salary checks for the parlor's female employees were drawn on petitioners' joint account and signed by petitioner William Mitchell (Tr. 691-692).

Until shortly before trial, petitioners and co-defendant Charles Mitchell were represented by the same retained attorney. At that point, in view of a possible conflict of interest between Charles Mitchell and petitioners, the attorney determined that he should no longer represent Charles Mitchell (Pet. 31-32). With the assistance of an associate, petitioners' attorney therefore represented the two of them jointly at trial and on appeal.

ARGUMENT

1. Relying primarily upon *Hawkins* v. *United States*, 358 U.S. 74 (1958), petitioner William Mitchell contends (Pet. 13) that the introduction of the tape-recorded conversations between his wife and the two government informants violated the marital privilege against adverse spousal testimony.[2] This claim is without merit.

Hawkins states the general rule that a defendant in a criminal action has a privilege to prevent his spouse from testifying against him. It has generally been held that this privilege is limited to in-court testimony and does not apply to out-of-court statements by a spouse that are introduced through another witness. See *United States* v. *Mendoza*, 574 F.2d 1373, 1379 (5th Cir. 1978); *United States* v. *Cleveland*, 477 F.2d 310, 313 (7th Cir. 1973); *United States v. Doughty*, 460 F.2d 1360, 1364 n.3 (7th Cir. 1972); *United States* v. *Mackiewicz*, 401 F.2d 219, 225 (2d Cir.), cert. denied, 393 U.S. 923 (1968); *Fowler* v. *United States*, 352 F.2d 100, 113 (8th Cir. 1965), cert. denied, 383 U.S. 907 (1966); *United States v. Winfree*, 170 F. Supp. 659 (E.D. Pa. 1959); contra, *Peek* v. *United States*, 321 F.2d

---

[2] The other branch of the marital privilege—the privilege against disclosure of confidential spousal communications—is not invoked here.

934 (9th Cir. 1963), cert. denied, 376 U.S. 954 (1964).[3]

The court of appeals noted that the Ninth Circuit follows the minority rule that the privilege extends to out-of-court statements testified to by third persons. The court declined, however, to apply that rule to extrajudicial statements by one spouse made in furtherance of a conspiracy to which both are parties (Pet. App. 60-63). While we believe that the majority rule is correct, the difference between the majority approach and the approach employed by the Ninth Circuit would not affect the outcome of this case. Moreover, a co-conspirator's declaration is one of the most common types of out-of-court statement by one spouse that is offered against the other. Because, as held in this case, such statements are admissible even under the Ninth Circuit rule, the theoretical conflict between the Ninth Circuit and the other courts of appeals may not be of much practical significance.[4] In any event, because the

[3] Rule 505 of the proposed Federal Rules of Evidence would have adopted the majority rule, limiting the scope of the privilege to the right to bar in-court testimony by a spouse. Although Congress did not enact proposed Rule 505, or any of the other proposed rules relating to privileges, the proposed rules are entitled to substantial weight as guides to the proper development of rules of privilege to be applied in the federal courts. See *United States* v. *Mackey*, 405 F. Supp. 854, 858 (E.D. N.Y. 1975) (Weinstein, J.).

[4] Several courts have gone a step farther and have held that the marital privilege is not available with respect to either in-court testimony or out-of-court statements if the husband and wife are shown to have been co-partners in the criminal

result reached on the marital privilege claim raised in this case would have been the same in any circuit, there is no need for review by this Court.

2. Petitioners also argue (Pet. 22-39) that they were denied the effective assistance of counsel at trial. This claim was not raised in the court of appeals until the petition for rehearing, and the court of appeals therefore did not discuss the claim in its detailed opinion in this case. Because the claim of ineffective assistance of counsel is heavily factual, and because it is being raised, in effect, for the first time in this Court, the claim is not well suited for present review. In any event, on the basis of our independent examination of the record, we do not believe that the claim has merit.

Petitioners' first contention is that their attorneys made only one pretrial motion, and that they failed to move for a change of venue or to interview the witnesses (Pet. 26). Petitioners have not suggested why a motion for a change of venue would have been appropriate or what prejudice they suffered because of their attorneys' alleged failure to interview the witnesses.[5] Moreover, their attorneys asserted the

venture. See *United States* v. *Trammel*, No. 76-1834 (10th Cir. Oct. 11, 1978); *United States* v. *Van Drunen*, 501 F.2d 1393, 1396-1397 (7th Cir.), cert. denied, 419 U.S. 1091 (1974).

[5] The thorough and effective cross-examination of witnesses conducted on their behalf (see, *e.g.*, Tr. 237-259, 531-552) belies the contention that their attorneys' pretrial preparation with respect to prospective testimony was inadequate. With respect to the claim that counsel improperly failed to seek a change of venue, it is apparent that venue was proper

marital privilege on behalf of petitioner William Mitchell, argued the motion orally and in a written memorandum of law, and succeeded in persuading the district court to make a tentative ruling in their favor. The fact that the court ultimately decided to admit Bobbi Mitchell's statements against her husband is more attributable to the weakness of the marital privilege claim in this context than to any infirmity in counsel's presentation of the issue.

Petitioner William Mitchell argues (Pet. 27-31) that he was denied the effective assistance of counsel by his attorneys' failure to seek a severance of his trial from that of his co-conspirators. But he apparently concedes that the initial joinder of the defendants was proper and that a severance was not required as a matter of law (Pet. 31). His contention is simply that the evidence against him was so slight in contrast to that against his co-defendants that a severance should have been granted had it been requested.[6]

---

in the Western District of Washington, since prosecution is appropriate in any district in which an alleged offense was begun, continued, or completed. 18 U.S.C. 3237(a). There is no suggestion that a change of venue would have been appropriate under Fed. R. Crim. P. 21(a) because of pretrial publicity or any other impediment to their obtaining a fair trial in the district in which they were prosecuted.

[6] To the extent that petitioner means to suggest that the tape-recorded conversations between his wife and the two informants would have been inadmissible against him in a separate trial (Pet. 27), he is incorrect. The statements were admitted as the declarations of a co-conspirator in furtherance of the conspiracy, and as such they would be admissible against him as vicarious admissions in either a joint or a separate trial.

The claim of "disproportionate evidence" as a basis for a severance in multi-defendant prosecutions is successful only in extraordinary cases. This is not one of them. Contrary to petitioner's assertion (Pet. 27), the evidence against his co-conspirators was not grossly disproportionate to that presented against him. There was substantial evidence that a conspiracy existed to transport women to Alaska for purposes of prostitution and that Mitchell was part of that conspiracy. Even disregarding the tape-recorded conversations of his wife that directly establish his central role in the illicit operation, it was clearly demonstrated that Mitchell's Anchorage business enterprise was the ultimate destination of the female government informants recruited as prostitutes. Co-defendants Charles Mitchell and Arnold Price provided the prospective employees with money for travel and with specific instructions to contact Bobbi Mitchell, William Mitchell's wife and business partner.

This case is readily distinguishable from *United States* v. *Mardian*, 546 F.2d 973 (D.C. Cir. 1976), upon which petitioner relies (Pet. 28). Among the considerations the court recited for holding that a severance should have been granted in that case was that the marginal case against defendant Mardian was bolstered by "spill-over" from the proof against much more culpable defendants. Not only was the evidence against petitioner William Mitchell substantial, but the nature of the proof was such that the jury could readily compartmentalize the evidence

respecting the different defendants, and it was specifically cautioned to do so in the final charge of the district court (Tr. 825-826). See *Gordon* v. *United States*, 438 F.2d 858, 878 (5th Cir.), cert. denied, 404 U.S. 828 (1971).

In sum, the record discloses no basis for trial counsel to have concluded that a motion to sever would have met with success. The failure to make futile motions does not amount to ineffective assistance of counsel. See, *e.g.*, *United States* v. *Yanishefsky*, 500 F.2d 1327 (2d Cir. 1974); *United States* v. *Martin*, 489 F.2d 674 (9th Cir. 1973), cert. denied, 417 U.S. 948 (1974); *United States* v. *Smith*, 551 F.2d 348, 353-354 & n.7 (D.C. Cir. 1976); *Cheeley* v. *United States*, 535 F.2d 934, 936 (5th Cir. 1976).

Finally, petitioners claim (Pet. 31-39) that they were denied the effective assistance of counsel because of their retained counsel's failure "to explore the potential conflicts of multiple representation and to recommend separate attorneys." Petitioners correctly note (Pet. 33-35) that the courts of appeals apply different verbal formulations of the standard for determining whether defendants have been prejudiced by an apparent conflict of interest in their joint representation by a single attorney.[7] We submit that these differences need not be resolved in a case

[7] The standards adopted by the circuits that have analyzed the issue are set forth in our brief in opposition in *Hurst* v. *United States*, No. 77-5157, cert. denied, 435 U.S. 972 (1978), at 5-6, a copy of which we are providing to petitioners.

such as this, where petitioners have not shown prejudice under any test.

The fact that petitioners were represented by the same trial attorney does not in itself constitute a constitutional deprivation of counsel. *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978). In cases in which joint representation is alleged as error on appeal, the court must ascertain whether a conflict of interest or prejudice in fact appears, and while "[o]rdinarily, prejudice would be assumed from the existence of a conflict, * * * a conflict will not be inferred from the fact of joint representation." *United States* v. *Foster*, 469 F.2d 1, 4 (1st Cir. 1972). In the instant case, petitioners have demonstrated nothing more than the fact of joint representation.

Petitioners note (Pet. 31-32) that prior to trial their attorney also represented co-defendant Charles Mitchell, but that the attorney and the trial court determined that in order to avoid the risk of a possible conflict of interest, Charles Mitchell should be separately represented. Although the record does not reflect whether petitioners were informed of the possibilities of a conflict of interest between themselves, the decision reached with respect to Charles Mitchell suggests that both the court and counsel were sensitive to the potential for conflict of interest in joint representation. The decision reached with respect to Charles Mitchell provides a reasonable basis for concluding that petitioners were aware of

the problem of potential conflict when they opted for continued representation by retained counsel.[8]

Petitioner William Mitchell suggests (Pet. 33-34) that the trial court should have inquired into the decision not to have him testify on his own behalf. Such an inquiry into defense strategy, however, would clearly be improper. Even now, Mitchell fails to suggest any way that he would have helped his cause by testifying. Counsel for petitioners was not confronted with the dilemma of representing one defendant who seeks to place blame on the other, and there is no evidence that the decision to have neither petitioner testify was prompted by concern about the possibility of conflicting defenses. The defense strategy throughout was consistent: in light of the evidence against petitioners and the other defendants, the only prospect for a favorable verdict lay in an attack upon the government's informant-witnesses and upon the conduct of the investigation of the case. Consistent with that approach, counsel urged the jury to acquit all the defendants on the basis of what he characterized as unjustifiably aggressive and technically sophisticated efforts at suppressing "victimless crimes" (Tr. 887-890).

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[8] The fact that counsel was retained rather than appointed further supports the conclusion that petitioners' decision to proceed with joint representation was knowing and intelligent. *Larry Buffalo Chief* v. *South Dakota*, 425 F.2d 271, 279 (8th Cir. 1970); *United States* v. *Gaines*, 529 F.2d 1038, 1043 (7th Cir. 1976).

In light of the strength of the government's case against both petitioners, it is unlikely that any independent defense strategy, on behalf of one or the other, would have had any greater prospect of success. Accordingly, since the record reflects no way in which either petitioner was prejudiced by the joint defense and joint representation, review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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